No. 12,042

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ERNEST J. UARTE,
Appellee.

BRIEF FOR APPELLEE.

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I.

STATEMENT OF PLEADINGS AND FACTS.

This is an action for personal injuries by appellee, Ernest J. Uarte, against appellant, United States of America, upon a complaint alleging that appellant, through its agents, Richard Francis Rogers and Roger Davis Green, negligently drove, operated and used a Ford station wagon owned by appellant, and thereby caused said Ford station wagon to collide with a Ford sedan automobile owned and driven by appellee, and caused said Ford sedan automobile to come into collision with a tractor and semi-trailer owned by Golden State Company, Ltd., and driven by one Don Arthur McCoy.

The action was filed and tried under the Federal Tort Claims Act, Title 28, United States Code, Section 931, et seq.

The action was tried without a jury before the Honorable Peirson M. Hall, who rendered his judgment in favor of appellee and against appellant in the sum of $17,130.05.

Briefly, the facts were as follows:

The accident occurred on or about July 24, 1946, at approximately 11:30 o'clock P.M. on U. S. Highway 99, approximately 2.6 miles north of the City of Madera.

At the place of the accident, U. S. Highway 99 consisted of pavement approximately 22 feet wide, divided into two lanes of traffic separated by a single white line.

At the time of the accident, it was raining and the highway was wet, slippery and dangerous.

Appellee, Ernest J. Uarte, was driving his Ford sedan automobile in a southerly direction on his right side of the road.

Don Arthur McCoy was driving the Golden State Company truck, semi-trailer and trailer in a northerly direction on his right side of the road.

Richard Francis Rogers and Roger Davis Green, who were both Chief Petty Officers in the United States Navy, and who were both employees of appellant, acting within the scope and course of their duties and employment, were driving the Ford station wagon owned by appellant in a southerly direction on their

right side of the road, and approached the place of the accident behind the Ford sedan automobile driven by appellee, Ernest J. Uarte.

There was evidence that in spite of the darkness and the rain and the slippery and treacherous condition of the highway, the station wagon was being driven at a high and negligent rate of speed in the neighborhood of 70 or 80 miles per hour (see Section II, *infra*).

Suddenly, appellee's Ford sedan automobile swung sharply and almost at right angles to the left across the highway and onto the east shoulder, and then southwest again, striking the Golden State Company tractor at the right front wheel and fender.

The impact of this collision spun the steering wheel of the tractor, and it went out of control and across the highway to the left where it was struck by appellant's Ford station wagon.

The positions of the vehicles and their relationship to each other upon the roadway after the accident is demonstrated by diagrams made by the highway patrol, and by photographs taken by the highway patrol, which appear in evidence as Plaintiff's Exhibits 13 and 2 to 12.

Richard Francis Rogers and Roger Davis Green were killed. Ernest J. Uarte received a fractured skull and brain concussion resulting in a complete amnesia as to the facts of the accident. No other witness saw the accident except Don Arthur McCoy, the driver of the truck, and his wife, who was riding in the truck but was unable to add anything additional to his testimony.

Therefore, it was for the trial court to determine, from the testimony of Don Arthur McCoy and the presumptions and reasonable inferences that could be drawn from the physical facts, what caused appellee's Ford sedan automobile to swing to the left side of the road and collide with the Golden State Company tractor.

The trial court heard the testimony, viewed the photographs, weighed the evidence and determined that the accident was caused by negligence on the part of the driver of appellant's station wagon without any negligence on the part of appellee, and upon this determination, rendered judgment in favor of appellee.

If there is any substantial evidence to support that judgment and the trial court did not commit error in the admission of evidence as complained of by appellant, the determination of the trial court is binding upon this honorable Court, and the judgment should be affirmed.

II.

BOTH THE JUDGMENT AND THE FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE.

Appellee testified at the trial, but as a result of his injuries, he had suffered a complete amnesia covering a period from his discharge from the army some seven months before the accident until he "woke up" in the hospital approximately thirty days after the accident (Tr. pp. 75 and 76). He remembered no facts of the accident (Tr. p. 75), and there was no other wit-

ness who could testify or did testify to any conduct on his part prior to or at the time of the accident which was irreconcilable with due care on his part.

Therefore, both under the law of California and under the federal decisions, it was presumed that appellee was free from negligence and that he exercised due care for his own safety; and in the absence of conclusive evidence to the contrary, the trial court was justified in finding according to the presumption.

Hoppe v. Bradshaw, 42 Cal. App. (2d) 334 at 339;

Durbrock v. Interstate Motor System, 143 F. (2d) 304;

Kriesak v. Crowe, 131 F. (2d) 1023;

Smellie v. Southern Pacific Company, 212 Cal. 540;

Westberg v. Willde, 14 Cal. (2d) 360;

Anthony v. Hobbie, 25 Cal. (2d) 814.

Therefore, the trial court in this case was entitled to presume and did presume that appellee was driving at a prudent rate of speed and otherwise was driving without negligence, and that his automobile went onto the left side of the highway without negligence on his part.

The most that appellant may say in this connection is that there was conflicting evidence from which the trial court might have reached a conclusion to the contrary, but even if this were conceded (which it is not), that conflict was resolved by the trial court against appellant.

On the other hand, there was substantial evidence from which the trial court was entitled to determine, and did determine, that the station wagon was travelling at a speed that was negligent under the circumstances, and that due to that speed and the negligent conduct of the driver in attempting to pass appellee's automobile at that speed on a wet, slippery highway, with the Golden State Company truck approaching from the opposite direction and only 50 feet away, the station wagon struck the left rear fender and wheel of appellee's automobile, blowing his left rear tire, and causing the automobile to careen across the highway and into the truck, as was described by the witness Don Arthur McCoy.

The pavement was 22 feet wide with room for only two vehicles to pass on the pavement in opposite directions (Tr. p. 30).

It was the first rain of the season and the pavement was wet, slippery and treacherous (Tr. pp. 63, 96, 108 and 122).

At a point 10 or 11 miles north of the place of the accident, the station wagon passed the witness Allen Thomas Roberts (Tr. p. 95), travelling "wide open" at a speed of from 70 to 80 miles per hour (Tr. pp. 95 and 96). As it passed on the slippery pavement, the back wheels failed to trail but "slid" and "skidded" (Tr. p. 97). The witness drove on to the scene of the accident at an estimated speed of 40 miles per hour (Tr. p. 97). At this rate of speed, it took his approximately 16½ minutes to cover that distance of 11 miles.

and by that time the accident had occurred, 20 or 25 automobiles had gathered at the scene of the accident (some 8 or 10 of which were headed south and must have been passed by the station wagon although the normal flow of traffic was moving at 35 or 40 miles an hour (Tr. p. 112)), and the truck driver had completed putting out flares (Tr. pp. 100 and 101). The putting out of flares took an estimated 10 minutes (Tr. pp. 113 and 114). Thus, according to the best estimates of the witnesses, the station wagon travelled the last 11 miles preceding the accident in less than half the time required by the witness. Mathematically calculated, it covered the distance in approximately 6½ minutes, or at an average speed of approximately 100 miles per hour.

Of course, it was the duty of the trial court to weigh this evidence in the light of reason, and since the trial court unquestionably realized, as does this Court, that any conclusion as to speed which is the result of mathematical calculations based upon estimates of time and distance can be no more accurate than the estimates upon which they are based, and that even a slight inaccuracy in an estimate may substantially change the whole result, it is doubtful if the trial court determined that the station wagon was actually travelling 100 miles per hour. But the trial court was entitled to infer from this testimony that the speed of the station wagon was not decreased after it passed the witness Roberts and at the time of the accident it was travelling at from 70 to 80 miles per hour.

This conclusion was corroborated by the testimony of the witness W. R. Daniels, who testified that the station wagon passed him some 4 or 5 miles north of the accident (Tr. p. 108), and that it was then travelling at the same speed at which it passed the witness Roberts, to-wit, 70 to 80 miles per hour (Tr. p. 110). At that point, which was on an "S" turn, the station wagon passed over a double white line in violation of law (California Vehicle Code, Section 525(b)), and in order to avoid a vehicle coming from the opposite direction, cut in front of the witness and behind another vehicle which was travelling in the same direction as the witness less than 300 feet ahead (Tr. pp. 109 to 111). When the station wagon again accelerated to pass the vehicle ahead, the driver "used so much throttle, he spun his wheels and there was a spray, it was like steam, spinning his wheels" (Tr. p. 112). The witness Daniels continued on to the scene of the accident and arrived there in an estimated time of 5 or 6 minutes (Tr. p. 118). By that time, the accident had occurred and enough time had elapsed for a number of other vehicles to have gathered at the scene (Tr. p. 112).

The conclusion of the trial court as to the speed of the station wagon is also supported by the reasonable inference permitted from the photographs of its condition after the accident (Plaintiff's Exhibits 2 and 5). When it is remembered that the station wagon struck the truck on the right front side after the truck had been involved in the accident with the Ford sedan and was swinging to the left at almost right angles

across the highway, and that the impact of this collision was greater than the first head-on collision with the Ford sedan (Tr. p. 139) and of sufficient force to kill both of the occupants, do the damage shown in the photographs, and spin the station wagon around and back so that it came to rest over 40 feet north of the point of impact (Plaintiff's Exhibit 13), the speed with which the station wagon struck the truck must have been nothing less than that described by the witness Daniels as "terrific" (Tr. p. 110).

Appellant states at page 12 of its brief that the highway speed at the point of the accident was 55 miles per hour. This is not an accurate statement. Section 510 of the California Vehicle Code provides as a basic speed law that "no person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property". The speed of 55 miles per hour referred to by appellant is only a *prima facie* speed limit which fixes the burden of proving that any certain speed is or is not in excess of the basic speed limit (Vehicle Code, Section 511), and surely appellant does not mean to argue that a speed of 55 miles an hour under the conditions existing at the time and place of this accident was a reasonable or prudent speed.

As before stated, Don Arthur McCoy, the driver of the truck, was the only witness who could testify directly to conduct on the part of any driver immedi-

ately before the accident. Don Arthur McCoy testified as follows:

Don Arthur McCoy was driving the truck, semi-trailer and trailer at approximately 40 miles an hour on the right half of the highway (Tr. p. 122). He first saw the lights of the Uarte Ford sedan (Tr. p. 125) approaching some 250 yards or 750 feet away, and at that time he also saw the lights of the station wagon following behind with "some distance" between them (Tr. p. 123). He could not estimate the speed (Tr. p. 124).

Because McCoy could only see the lights, he could not say definitely that the station wagon came abreast of the Uarte automobile, but he did testify that as the lights came closer, the second set of lights was "blacked out" (Tr. p. 124), and then when the Uarte automobile was approximately 50 feet north of him (Tr. p. 125), the second set of lights again came into view, at which time the two vehicles were very close together, in fact so close that while the witness could then see all four lights (Tr. p. 148), they both "seemed as one" and they "seemed to bunch and jump" (Tr. pp. 130 and 131), and at that instant the Uarte automobile, which before that had been travelling on the right side of the highway and had not swerved or swayed or zig-zagged or in any way deviated from a straight course (Tr. p. 143), suddenly swerved across the highway to the left at almost a right angle to the highway (Plaintiff's Exhibit 14; Tr. pp. 125 and 133).

As the Uarte automobile crossed in front of the truck and across the path of the truck's headlights, McCoy could see Uarte sitting up alert in the seat, frantically pulling at the steering wheel in an attempt to hold the automobile under control and get it back on the right side of the highway (Tr. pp. 125 and 144).

The course taken by the Uarte automobile was drawn by the witness McCoy upon a diagram which is in evidence as Plaintiff's Exhibit 14. The course of the automobile was marked with the letters M3, M2 and M1, and Don Arthur McCoy testified that the Uarte automobile "just seemed to fairly jump out there" (Tr. pp. 132 and 133), with the rear end skidding ahead of and further than the front so that when the automobile reached the most easterly point in its course, the rear end was off of the pavement and the front end on the pavement and the automobile facing in a southwesterly direction, from where it proceeded into the right front of the Golden State Company truck (Plaintiff's Exhibit 14; Tr. pp. 125, 126 and 166).

The photograph of the Uarte automobile taken by the highway patrol immediately after the accident (Plaintiff's Exhibit 3) demonstrates that the *left rear fender and corner* were severely damaged although the collision between that automobile and the truck involved the *right front corner* of the automobile and the right front corner of the truck.

The witness Ceferino Layana, who was asleep in the Uarte automobile, testified that he was suddenly awakened by a "kind of jerk or something", and that

this was before the collision with the truck (Tr. p. 176).

From the above, and without any further testimony upon the subject from the witness Don Arthur McCoy, it was reasonable for the court to have drawn the inference that the Uarte automobile had been struck or "clipped" from behind on the left rear fender and wheel as the station wagon attempted to pass the Uarte automobile without sufficient clearance between the Uarte automobile and the approaching Golden State Company truck. However, Don Arthur McCoy testified as follows:

> "Q. And will you state to the Court now what the impression was that you got, what appeared to you to happen there?
>
> A. This was what appeared to me, your Honor, it is an assumption, it is a conclusion that I came to, was that——
>
> Mr. McKnight: Just a minute.
>
> The Court: No.
>
> The Witness: Well, the statement——
>
> Q. By Mr. McKnight: It is your impression from what you saw?
>
> A. Yes, sir, that is right; the impression, that is what I mean, yes, sir.
>
> Q. All right.
>
> A. The impression that I got at that time was that the car either skidded or was clipped.
>
> The Court: Or was clipped?
>
> The Witness: Yes, sir."
>
> (Tr. p. 129.)

> "Q. By Mr. McKnight: And there was sufficient so it appeared to you that one of them had clipped the other one?

A. Well, something happened. I don't know what happened.

Q. Well, to refresh your memory, I will ask you if these questions were asked you and these answers were made by you to the District Attorney on the night of the accident, for the purpose of again refreshing your memory:

'Q. Do you have the impression that these cars coming towards you were abreast at the time you approached them?

A. Well, I would really rather not say. I couldn't hardly make a statement, but they were awfully close together. They were just like one.

Q. You aren't able to say whether they were abreast, or whether one was passing the other?

A. No.

Q. Can you say this: both appeared to be in the southbound lane together, coming toward you?

A. It appears to me that *one clipped the other and threw him there,* or one blew a tire, or something.

Q. As this car swerved toward you, the Ford Sedan that hit you first, did it turn suddenly toward you, or gradually turn toward you?

A. It pulled right into me. It just seemed to fairly jump out there. That is the reason that I thought he *got clipped* or blew a tire. It seemed like he was on one side and right now he was over there.'

Do you remember those statements?

A. *Yes,* sir.

The Court: *Are those true?*

The Witness: *To the best of my knowledge, yes, sir.*"

(Tr. pp. 132 and 133.)

"The Court: *To the best of your recollection, was the leading car clipped from the rear or from the front?*

The Witness: Well, I wouldn't say—from the rear.

The Court: From the rear?

The Witness: *The leading car was clipped.*

The Court: Clipped from the rear.

The Witness: *If it was clipped, it would be——*

The Court: Well, that is your recollection?

The Witness: *Yes. It was either clipped or he blew a tire, your Honor, something that caused him to go across there.*"

(Tr. p. 134.)

"Q. And you also stated in answer to counsel's question that your statement to the District Attorney and here in Court that the rear vehicle appeared to clip the other vehicle was based—was a pure—was a conclusion. That conclusion or impression, or whatever you want to call it, was based on what you saw there, then, that night, wasn't it?

A. It was based on the actions of the Uarte car.

Q. And also on the actions of the other car when you saw the two lights bunched together and then one start skidding, wasn't it?

A. Yes, sir."

(Tr. pp. 164 and 165.)

"The Court: *Have you seen other cars clipped?*

The Witness: *Yes; yes, I have, lots of times.*

The Court: *Have you seen other cars blow tires?*

The Witness: *Yes,* sir.

The Court: Do they always act the same?

The Witness: Sometimes they act the same, yes, they do.

The Court: Generally?

The Witness: Generally.

The Court: *This car acted like it was either clipped or blew a tire?*

The Witness: *Yes,* sir.

Q. By Mr. Deutz: I would like to ask you a question: Mr. McCoy, from your experience—How long have you driven trucks or automobiles?

A. 20 years.

Q. For 20 years, and you have driven them in all types of weather?

A. Yes, sir."

(Tr. pp. 157 and 158.)

Appellant argues that this testimony has no probative force because it constituted only an opinion or conclusion of the witness, and the United States attorney did lead the witness into saying that it was only a conclusion (Tr. p. 157).

However, this Court must remember that the examination of the witness McCoy was in the nature of cross-examination under Rule 43(b) of the Federal Rules of Civil Procedure. On several occasions, the witness refused to answer questions on the ground that he did not remember or know a fact, and it was necessary for appellee's counsel to refresh his memory by the use of statements previously made by him in order to get any testimony upon the subject, and, under these circumstances, appellee's attorney was

entitled to more leniency from the court in conducting that examination then would have been justified in a case of a completely and fully cooperative witness.

Moreover, the statements complained of were not actually the opinions of the witness but an attempt on the part of the witness to describe in his own words what he had actually seen. In 32 *Corpus Juris Secundum* at pages 144 and 151, it is said:

> "It frequently occurs that the constituent impressions received from observation of an occurrence or condition are so subtle, so interwoven, so transitory and evanescent, or so numerous that their proper presentation to, or suitable coordination by, the jury is practically impossible; and under such circumstances the observing witness is permitted to state his inference or conclusion, for the reason that such a statement is the only method of conveying to the jury the effect on his mind of what was observed by him."
>
> * * * * * * *
>
> "A competent witness may state in the form of an inference the cause of a certain occurrence or phenomenon, as for instance *the cause of a personal or property injury,* sickness, death, *or accident.* It merely reverses the statement to say that a witness may equally well infer that given phenomena are the effect of a designated cause, or what has been the effect of such cause, and under what conditions it will manifest its existence."

This rule is recognized in California and by all text writers upon the subject. In *Manney v. Housing Authority,* 79 Cal. App. (2d) 453 at 459, it is said:

"The opinions of nonexpert witnesses are admitted as a matter of practical necessity when the matters which they have observed are too complex or too subtle to enable them accurately to convey them to court or jury in any other manner. (10 Cal. Jur., Evidence, Section 236, pp. 978-980; 7 Wigmore on Evidence, 3d ed., Section 1924, pp. 22-23; Jones on Evidence, 3d ed., Section 360, p. 542 et seq.; 1 Greenleaf on Evidence, 16th ed., Section 441(b), p. 550; 20 Am. Jur., Evidence, Section 769, p. 540; 32 C.J.S., Evidence, Section 444, p. 73, Section 485, p. 144.)"

Again in *Healy v. Visalia R. R. Co.,* 101 Cal. 585 at 589, it is said:

"The general rule is that the testimony of a witness shall be limited to the facts of which he has a personal knowledge, and that he shall not give his individual opinion thereon; *but in many instances the opinion of a witness may be received in connection with his statement of the facts upon which it is based.* The border line between fact and opinion is often very indistinct, and the statement of a fact is frequently only an opinion of the witness. *Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words,* nor do they affect every individual alike, and the judgment or opinion of the witnesses by whom they have been experienced is the only mode by which they can be presented to a jury."

In *Dean v. Feld,* 77 Cal. App. (2d) 327 at 330, it is said:

> "'*Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words, nor do they affect every individual alike, and the judgment or opinion of the witnesses, by whom they have been experienced is the only mode by which they can be presented to a jury.*' . . . A witness is not required to testify with that degree of certainty which excludes all doubt from his mind. . . . *That which is reasonably descriptive of a car in action is proper.*"

See also:

Fred J. Kiesel & Co. v. Sun Insurance, 88 F. 243;

Corrigan v. U. S., 82 F. (2d) 106.

It is true that the witness McCoy stated that he did not see any contact between the station wagon and the Uarte automobile, and of course it was impossible for him to have actually seen any such contact, because at that time all he could see was the lights of the two vehicles which were shining directly into his eyes (Tr. p. 164), but, as an experienced truck driver who had witnessed such accidents many times before, he did obtain a definite impression of what had happened from what he did actually see, and the witness was describing what he saw in the most descriptive language at his disposal.

Appellant also complains that since the witness McCoy testified in the alternative that the Uarte automobile was either clipped or blew a tire, the trial court was not justified in finding in favor of either

one of those alternatives as against the other. But, in this connection, it is clear that it was for the trial court to determine whether the automobile went out of control because it was clipped or because it blew a tire, or whether both alternatives took place and the automobile blew a tire as a result of being clipped, and appellant ignores the fact that the witness Peter Badostain testified that before the accident all of the tires were good (Tr. p. 174) and the witness McCoy testified in effect that there was nothing in appellee's driving of the automobile which should have caused a tire to blow without an impact with some other object (Tr. p. 149), and that the trial court made its decision, not upon any one statement of any witness, but from all of the evidence in the case.

In any event, the record discloses that at the time of trial no objection was made by the United States attorney to any of the evidence above quoted. It is true that a motion to strike was made in connection with the one particular question and answer found at page 129 of the transcript, but that motion did not go to any other of the testimony quoted, and it is a well-settled rule of law that even where testimony would be inadmissible if the proper objection were made, where it is received without objection, it constitutes evidence in the case and will support a judgment based upon it.

> *Abbott v. Limited Mutual Compensation Insurance Company,* 30 Cal. App. (2d) 157 at 163;

People v. One Ford V8 Coach, 21 Cal. App. (2d) 445 at 448;
Parsons v. Easton, 184 Cal. 764 at 769;
Clark v. McNeil, 25 F. (2d) 247 at 250.

It is also true that appellant attempted to convince the trial court that the damage to the left rear corner and fender of the Uarte automobile was caused by a third impact between the Uarte automobile and the rear of the semi-trailer, and appellant attempted to support this argument with testimony that on the left rear of the Uarte automobile above the fender there was found what appeared to be cream colored paint, and that the Golden State Company semi-trailer was painted cream (Appellant's Opening Brief, p. 12). However, it was the function of the trial court to believe or disbelieve that testimony and to interpret it, and since it appeared in the evidence that a part of the body of the station wagon was a "bleached white" or "egg-yolk yellow" (Tr. pp. 260 and 261), and since the witness Don Arthur McCoy, who described the paint smear on the Uarte automobile, also testified that he was unable to determine how it got there or whether it was actually paint from an outside source or simply the undercoating on the vehicle itself, or whether or not it was the same paint as was on the semi-trailer (Tr. pp. 166, 167 and 153), and since at the time of the impact between the Uarte automobile and the truck, the left rear of that automobile was on the opposite side from the point of impact (Tr. p. 166), and since the third impact to which

appellant refers came *after* the second impact between the station wagon and the trailer (Tr. p. 156), at which time the trailer was more than 100 feet north of the gouge marks which represented the location of the first impact between the truck and the Uarte automobile (Tr. p. 142; Plaintiff's Exhibit 13) and over 90 feet north of the point where the Uarte automobile came to rest (Plaintiff's Exhibit 13), it is clear why the trial court in the exercise of sound judgment could not accept appellant's theory upon this subject and was well within the limits of judicial discretion in determining that the damage to the left rear of the Uarte automobile was caused by an impact from the station wagon, which in turn caused the Uarte automobile to go out of control and cross the highway, and to collide with the truck.

The impact of the collision between the Uarte automobile and the truck caused McCoy to lose control of his equipment, the steering wheel spun, and the truck went across the highway to the left where it was struck by appellant's station wagon (Tr. pp. 137 to 139). The two collisions were almost instantaneous and not more than a second apart (Tr. pp. 137 and 138), and the second impact between the station wagon and the truck was more severe than the first impact between the Uarte automobile and the truck (Tr. pp. 139 and 156).

The tractor and semi-trailer came to rest on the west shoulder of the highway with the trailer across the southbound lane of traffic over 100 feet north of

the gouge marks which marked the point of impact (Plaintiff's Exhibit 13; Tr. p. 142).

The Uarte automobile came to rest on the east shoulder 33 feet northeast of the point of impact and 93 feet and 10 inches south of where the trailer came to rest (Plaintiff's Exhibit 13).

The station wagon came to rest in the southbound lane of traffic 40 feet and 8 inches north of the trailer (Plaintiff's Exhibit 13).

In view of all of the above and of the established rule that all conflicts and reasonable inferences shall be resolved in favor of the judgment, it is difficult to understand appellant's argument that the evidence was insufficient to support the findings and the judgment of the Court.

III.

THE COURT DID NOT ERR IN RECEIVING EVIDENCE OF SPEED.

The first error of law urged by appellant is that the Court erred in admitting evidence of the speed of the Government station wagon at a point 10 to 11 miles from the scene of the accident and at a point 4 to 5 miles from the scene of the accident.

Appellant first cites *Blashfield, Cyclopedia of Automobile Law and Practice,* Section 6176, to the effect that evidence of conditions remote in time and distance from the time and place of the accident is in-

admissible. But, in the same section of the text, it is said:

> "Collisions often result from the racing of cars, and evidence is admissible to show racing, but evidence of speeding and racing between two cars upon the road may be so remote in time and distance as not to be admissible in evidence, *and whether it is such in a given case rests in the sound discretion of the court, . . .*"

To demonstrate that this is the correct rule, both in the Federal courts and in the California courts, and that it is for the trial court to determine in each case under all of the circumstances and evidence whether or not the testimony offered is too remote to have probative value, this Court need only refer to the authorities cited in appellant's brief.

In *Dromey v. Interstate Motor Freight Service,* 121 F. (2d) 361, cited by appellant, evidence of the speed of the defendant's automobile "several miles" from the accident, and again a mile and a half from the accident, was admitted, and the trial court said:

> "Appellants vigorously assail the introduction of what they call highly prejudicial evidence regarding the speed with which the Kuczyk car was being driven. This testimony was given by four boys who stated that they had raced the latter car *for several miles* until they reached a point about a mile and a half south of the scene of the accident where they turned off Sheridan Road. They all testified that Kuczyk was driving at a speed of from 65 to 70 miles an hour with the exception of a few blocks within the city limits

> of Zion where both cars slowed down. This evidence of speed was corroborated by that of two other witnesses, one of whom said that, at a point about *a mile and a half* south of the accident, the Kuczyk car passed the car in which they were driving, going at a speed of about 70 to 80 miles an hour, and the other, that it was going 'terribly fast.' Mrs. Davis and her son also testified that the Kuczyk car went by, 'like a flash' and 'like a skyrocket.' The truck driver also estimated the speed at which Kuczyk was driving at about 70 miles an hour. *We think this corroborative evidence tends to prove the continuity of the excessive speed of the Kuczyk car up to the point of the accident,* thus rendering inapplicable a case relied upon by appellants to show the inadmissibility of evidence of speed not proved to have continued up to the place of the accident."

In *Melville v. State of Maryland,* 155 F. (2d) 440, evidence of the squealing of tires as the defendant's truck rounded a curve at least 9 miles from the place of the accident, and the testimony of another witness that some 300 yards from the scene of the accident, the defendant failed to dim his lights and was straddling the painted center line of the road, causing the witness to "hit the dirt", and that the speed of the defendant's truck at that time was in excess of 45 miles per hour, was admitted in evidence, and the court said:

> "Appellant next objects to the rulings of the trial court in admitting the testimony of the witnesses, Bowden, Davis and Williams.

"Bowden testified that at 11:15 p. m. on the night of the collision, he saw a Melville truck in Berlin (*at least nine miles from the place of the accident*), that he saw the occupants go into a beer tavern, that they came out soon thereafter and asked him the way to Cape Charles, *that he heard the tires of the truck squeal as it rounded a curve in Berlin.* . . .

". . . The squealing of the tires may be somewhat remote, though it may tend to indicate the custom of the driver in taking curves.

* * * * * * *

"The much more important testimony of Davis as to the manner of operation of the Melville truck, when the Melville truck passed the truck driven by Davis approximately 300 yards from the scene of the accident seems clearly relevant and admissible. . . .

"Davis testified that he dimmed his lights, which the Melville truck failed to do. He testified that the Melville truck was hogging the road (that is, that it was too far to its left, straddling the painted centerline of the road) and that Davis was thereby compelled to hit the dirt (that is, Davis had to drive with his right hand wheels completely off the macadam and on the dirt shoulder). Davis further stated that the speed of the Melville truck was in excess of 45 miles per hour."

Appellant treats as a leading case in California, *Pruitt v. Krovitz,* 59 Cal. App. (2d) 666, 139 P. (2d) 992, and in that case, the court reaffirmed the well-established rule that "the admission or rejection of

evidence as to the rate of speed a vehicle is travelling before a collision occurs rests in the sound discretion of the trial court," and that "the question rests so largely within its discretion that no fast or positive rule can be laid down governing the matter."

In discussing the point, appellant states that "in the cases where such evidence is allowed, there were additional factors other than the mere observance of speed at an isolated point not contiguous to the point of impact." Appellee again wishes to point out that there were such additional factors in the case at bar.

Not only did the two witnesses testify as to the speed of the station wagon at the points mentioned, but they also testified to facts leading to the inevitable inferences that this was a continuing rate of speed and did continue to the point of impact. As pointed out (with transcript references) in Section II of this brief, the witness Roberts testified to facts from which it could be determined that he drove from the point where the station wagon passed him to the scene of the accident at 40 miles an hour and that it took him more than twice as long to reach the scene of the accident as it took the station wagon, thus indicating that the station wagon continued on to the scene of the accident at at least twice that speed. This same fact could also be inferred by simple mathematical calculations based upon the speed at which the witness Roberts was travelling, the length of time it took him to reach the scene of the accident, and the period of time elapsing between the happening of the accident and the arrival of the witness Roberts at the accident.

The continuity of the speed of the station wagon was further demonstrated by the fact that when the station wagon passed the witness Daniels it was still travelling at the same speed at which it passed the witness Roberts, to-wit, 70 to 80 miles an hour, and by the reasonable inferences which could be drawn from the manner in which the accident happened and the condition of the station wagon after the accident indicating the terrific speed with which the station wagon struck the truck.

In addition to this, in line with some of the elements mentioned in the authorities cited by appellant, it was proved that the accident happened at night-time on a straight level State highway and not in the vicinity of any intersecting road, that the highway between the place where the station wagon passed the witness Roberts and the scene of the accident was protected by stop signs at the few crossroads which did intersect, and that there was nothing to slow down traffic in that distance (Tr. pp. 99 and 100).

In this connection, appellant cited 14 authorities where "evidence of speed was not allowed" and 12 authorities where "evidence of speed was allowed." The very citing of these authorities indicates that the admissibility of evidence in each case must depend upon that particular case, and a reading of all of those authorities will demonstrate that the matter is held to be within the discretion of the trial court and that the instances where the decision of the trial court upon the subject has been disturbed on appeal are extremely rare.

In 10 of the 14 cases cited by appellant where evidence of speed was not allowed, the decision of the trial court was actually affirmed, and it was simply held that where the trial court, under the particular circumstances of the case, exercised his discretion to exclude the evidence, it was not an abuse of discretion to do so, and in none of those cases was the continuity of the speed established as it was in the case at bar.

It should also be remembered that cases involving accidents upon city streets and at intersections, where the speed of a vehicle is normally increased and decreased within very short distances, present an entirely different picture from that presented in the case at bar.

In *Pruitt v. Krovitz,* 59 Cal. App. (2d) 666, cited by appellant, the accident happened at an obstructed intersection in the city of San Mateo, and the appellate court affirmed the decision of the trial court which received evidence of the speed of the defendant's automobile a block from the intersection, and, in so doing, stated that defendant's speed could be connected with the accident by the inferences which could be drawn from the condition of the automobile after the accident. The court said:

> "Furthermore the location and condition of both cars following the collision fully supports the inference that appellant's car struck the coach while appellant was travelling at a high rate of speed."

Appellant also cites *Ackel v. American Creamery Co.,* 12 Cal. App. (2d) 672, 55 P. (2d) 1195. Again,

the accident in this case happened at a busy intersection in the city of Oakland, and the decision of the appellate court was only *to affirm the exercise of the trial court's discretion* in excluding evidence of speed some distance from the accident. In so doing, the court said:

> *"Had the trial court received the proffered evidence its weight would have been a matter for the jury."*

In *Gritsch v. Pickwick Stages System,* 27 Cal. App. (2d) 494, cited by appellant, it was held that even where the evidence of speed was too remote and should not have been admitted, its admission was not so prejudicial as to require a reversal of the judgment.

Other California authorities holding that the admissibility of such evidence is a matter for the trial court under all of the circumstances of each case are as follows:

Traynor v. McGilvray, 54 Cal. App. 31;
Lundgren v. Converse, 34 Cal. App. (2d) 445;
Ritchey v. Watson, 204 Cal. 387;
Mathews v. Dudley, 212 Cal. 58.

Appellee submits that the admission of the evidence in this case was a proper exercise of the trial court's discretion and did not constitute error.

IV.

THE COURT DID NOT ERR IN PERMITTING DON ARTHUR McCOY TO BE EXAMINED AS AN UNWILLING OR HOSTILE WITNESS.

Rule 19(6) of the Rules of Practice of this Court requires that the appellant "*shall,* upon the filing of the record in this Court . . . file with the clerk a concise statement of the points on which he intends to rely on the appeal . . . and forthwith *serve* on the adverse party a copy of such statement."

Rule 20(2-d) of the Rules of Practice of this Court requires that "when the error alleged is to the admission or rejection of evidence the specification of error (in appellant's brief) shall quote the grounds urged at the trial for the objection . . . and refer to the page number in the printed or typewritten transcript where the same may be found."

Appellant, at page 5 of its brief, sets forth as a specification of errors the following:

> "(e) The Court erred in permitting Don McCoy to be called and examined as an adverse witness by the appellee under the provisions of Rule 43(b), F. R. C. P.
>
> "(f) The Court erred in overruling the appellant's objections to the appellee's findings of fact."

Pursuant to Rule 19, appellant did serve upon appellee a document entitled "Statement of Points on which Appellant Intends to Rely on Appeal," but that document *omitted* specifications (e) and (f) above set

forth, and an examination of the records will disclose that the document now on file in the clerk's office from which the transcript in the case was made up, which does include those specifications, was *never served* upon appellee.

Appellant also violated Rule 20(2-d) in that appellant's brief does not quote or refer to any objection made by the United States attorney to the testimony of Don Arthur McCoy.

Appellee respectfully submits that for these reasons, this Court should not consider these specifications of error.

Appellee further submits that on the merits, these specifications of error must be rejected.

The presence of Don Arthur McCoy as a witness in the case was obtained by appellant, but due to the absence of any other eyewitness to the accident, appellee was required to examine the witness to establish his case. At the opening of the trial, appellee's attorney stated:

> "Mr. McCoy, the driver of the truck, is not personally hostile. He is a gentleman in every way. He is an adverse party in another suit that is pending in the State Court. His employer is an adverse party in another suit. He is represented in the other case by his own counsel.
>
> Mr. Deutz: You have to correct that, counsel. I don't believe they are adverse parties. I believe they are co-defendants.
>
> Mr. McKnight: He is, according to the Supreme Court of California, an adverse party, but

in this case, I treat him as an adverse party because somebody caused it and each would like to have somebody else blamed, and the Supreme Court of the State of California has said that he is an adverse party.

The Court: He is adverse to everybody.

Mr. McKnight: He is adverse to everybody except to himself and his employer. He has been subpoenaed. He has come in at the request of the government, who actually wanted him also, but he is in a position, I think, of what Rule 43b intended as an unwilling and hostile witness, and it will be necessary to prove my case with that type of a witness, which makes it rather difficult, and I start this case knowing that" (Tr. pp. 36 and 37).

And, when Mr. McCoy was called to the witness stand, appellee's counsel stated:

"The Court: Very well. Call the next witness.

Mr. McKnight: Mr. McCoy. This witness is the witness I desire to call under Rule 43(b).

The Court: Well, he hasn't given an demonstration of hostility yet. I don't know. He may not.

* * * * * * *

Mr. Deutz: *Your Honor, I don't object to the reference to Section 43(b),* but, he is calling him as his own witness and is bound by his testimony unless there is some showing of adversity.

The Court: Well, let me see the rule. The bailiff or somebody will get me a copy of it. Will you see if you can get me the Rules of Civil Procedure?

* * * * * * *

Mr. McKnight: That is what I had in mind. This witness, your Honor please, was originally

a defendant in this suit. He has now been dismissed, and is not an adverse party in this suit. However, he is an adverse party, to-wit, a co-defendant in another action which has been filed in the Superior Court, which has been tried once, and which, in all probability, will be tried again—

The Court: In what Superior Court?

Mr. McKnight: Of Madera County.

The Court: Of Madera County.

Mr. McKnight: —having resulted in a non-suit as to one defendant and a hung jury as to the other defendant. He was represented by his own counsel.

I have not had full opportunity to discuss his testimony with him. True, I did see him this morning and talk to him for about a minute or two. Under those circumstances, I feel that his interests are different than ours and I would like the privilege of examining him under that Section, although Mr. McCoy has always been a gentleman and has showed no great impartiality to anyone so far in the case.

Mr. Deutz: I would like to point out, your honor, that in so far as Mr. McCoy's testimony is concerned, it has been clearly covered at the previous trial, so counsel for the plaintiff is not completely unaware of the testimony to be given in this case.

Mr. McKnight: Not if it is the same, your Honor.

The Court: I think under the rule it is permissible. It states a party may interrogate an unwilling or hostile witness by leading questions. There isn't any evidence of any hostility on the

part of this witness on this trial here. There isn't any controversion of the statement that he is yet a party to an action now pending against him arising out of the same incident which causes this action. The record shows that he was originally a party to this action, and the rule also permits the calling of an adverse party.

I think from the fact that he is a party to the action pending in the State Court, that the Court would be justified in indulging the presumption that he would be an unwilling witness, because unwillingness arises from a great many things, and it is natural that a person should be unwilling to take the witness stand and confess any error or commit any error on their part.

I think, moreover, that he can be cross examined under Rule 43 by virtue of the fact that he was a party to this action.

While it is true that a motion to dismiss was partially granted as to all defendants except the United States, and as to this defendant an order was made doing so, and while it is true that that is the law of this case, as far as this Court is concerned, because the ruling was made by another judge of this court, in this case, nevertheless, it is not beyond the realm of possibility that some higher court, by the time they get through with it, may put him back in as a party, and, in the meantime, the plaintiff in this case should not be deprived of a right which is given to him under the rule, and for that reason the motion is granted and the objections to it are overruled.

You may proceed under Rule 43(b)."

(Tr. pp. 118 to 121.)

It has been held that a co-defendant is subject to cross-examination as an adverse party:

Goehring v. Rogers, 67 Cal. App. 260 at 262.

Thus, the following appeared:

(1) Don Arthur McCoy and his employer had been defendants in this action, but had been dismissed on a question of jurisdiction.

(2) At the time of the trial in this case, Don Arthur McCoy and his employer technically were adverse parties in an action in Madera County arising out of the same accident.

(3) In the Madera County action, appellee and Don Arthur McCoy were not only adverse parties technically, but their interests were actually different since it was a defense to Don Arthur McCoy and his employer to prove that appellee was responsible for the accident.

(4) At the time of this trial, Don Arthur McCoy and his employer were represented in the Madera Court action by their own counsel.

(5) Don Arthur McCoy had been subpoenaed and brought to this trial at the request of the United States attorney, and appellee's counsel had had no opportunity to discuss his testimony with him.

Appellant states in its brief that the trial court "held McCoy to be an adverse party within the meaning of F. R. C. P. 43(b)" (Appellant's Brief, p. 21), but this is not true. The ruling of the trial court as above set forth did not permit the witness to be ex-

amined as an adverse party. The trial court did state that in permitting the witness to be examined under Rule 43(b) as an unwilling witness, he took into consideration the fact that he *had been* an adverse party in the case, but the trial court stated expressly that he was bound by the previous decision of another judge dismissing the action against McCoy, and his ruling was simply that appellee could proceed under Rule 43(b) (Tr. pp. 38, 120 and 121).

In this connection, the United States attorney told the trial court that he had no objection to the witness being called under that section.

> "Mr. McKnight: Mr. McCoy. This witness is the witness I desire to call under Rule 43(b).
> * * * * * * *
> Mr. Deutz: *Your Honor, I dont object to the reference to Section 43(b),* but, he is calling him as his own witness and is bound by his testimony unless there is some showing of adversity."

The ruling was: "You may proceed under Rule 43(b)."

Rule 43(b), F. R. C. P., reads as follows:

> "(b) *Scope of Examination and Cross-Examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party . . ."

Thereafter, appellee did interrogate Don Arthur McCoy by leading questions as permitted by the rule

in the case of an unwilling witness, but appellee did not attempt to contradict and impeach him as an adverse party, and a reading of the entire testimony of Don Arthur McCoy will disclose that the witness was never impeached by appellee's attorney.

In fact, appellant's only present complaint in reference to the examination of Don Arthur McCoy is that the trial court permitted appellee to use the statement made by McCoy on the night of the accident (Appellant's Brief, p. 21), but in this connection the record discloses that the statement was not put in evidence, and was used by appellee, not as impeachment, but simply to refresh the witness's memory, which was permissible even in the absence of any application of Rule 43(b).

The statement was used four times. The first time it was used, appellee's attorney expressly asked the witness if the statement would refresh his memory upon a point upon which he was uncertain, and the witness stated that he believed it would. The witness was permitted to read the statement and stated that it did refresh his memory, and he then testified as to the fact (Tr. pp. 127 and 128). The second time, the statement was used by the trial court and was not a part of appellee's attorney's examination (Tr. pp. 130 and 131). The third time, appellee's attorney again stated that he was using the statement solely for the purpose of refreshing the witness's memory, and after a portion of the statement was read to him, the witness testified that he then remembered the facts and that they were true (Tr. pp.

132 and 133). The fourth time, the statement was used by the United States attorney himself (Tr. pp. 156 and 157).

The statement was originally authenticated for use in the case at the suggestion of the United States attorney and by stipulation of the parties (Tr. pp. 41 and 42), *and in none of the instances above set forth where the statement was used, did the United States attorney make any objection to its use.*

To summarize: The United States attorney expressly told the court that he did not object to the "reference" to Rule 43(b) so long as appellee called McCoy as his own witness and was bound by his testimony. Thereafter, appellee called McCoy as his own witness and examined him under Rule 43(b), but did not at any time attempt to contradict or impeach him under that rule as an adverse party. The only prejudice claimed by appellant is the use of a statement previously made by the witness to the District Attorney of Madera County, but that statement was originally authenticated for use at the suggestion of the United States attorney and appellee only used that statement to refresh the witness's memory, and the same statement was used by the United States attorney in his cross-examination of the same witness. At no time during the trial did the United States attorney make any objection to the examination of the witness upon the ground that the questions were leading or that appellee was impeaching his own witness, or upon any ground connected with Rule 43(b), and at no time did the United States attorney make

any objection to the use of the statement made to the District Attorney of Madera County.

Under these circumstances, there was no error in the ruling of the trial court or in the examination of the witness, and if there was any such error it was waived by the United States attorney, and in view of all of the other evidence in the case, could not possibly have resulted in prejudice requiring a reversal of the judgment.

V.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTIONS TO THE FINDINGS OF FACT.

Throughout its brief, appellant has argued that the trial court's findings of fact were in error because they did not correspond in all ways with the informal discussion between the trial court and the United States attorney at the close of the case.

Appellee submits that if the findings of fact are supported by the evidence in the case, the trial court did not commit error in this connection, regardless of any discussion prior to the signing of the findings of fact.

However, the trial court did not in his discussion with the United States attorney announce any specific finding of fact or confine himself to any particular theory as to how the accident happened. Most of that discussion took place when the United States attorney was arguing for a dismissal of the action

upon the ground of the insufficiency of the evidence, and the trial court was simply explaining to the United States attorney that there were various inferences which he might draw from the evidence which would require him to deny the motion. Other statements were made in answer to the United States attorney's claim that there was only one theory, to-wit, his own, which the trial court could accept under the evidence. The position of the trial court in this respect was made completely clear when the trial court overruled appellant's objections to the proposed findings and stated as follows:

> "The colloquy with counsel on argument at the conclusion of thetrial and the court's observation at that time were not intended to be a resume of the evidence or the postulation of any 'theory'. The Court's remarks were intended to be more than its conclusion that, from all of the evidence in the whole case and considering the witnesses, their interests, their manner of testifying and under all the other rules for weighing evidence, the evidence preponderated to show that the driver of the station wagon was negligent, and that such negligence was the proximate cause of the accident, without any contributory negligence on the part of the plaintiff or the driver of the truck vehicle which was involved in the accident.
>
> "The objections to the proposed findings are overruled."
>
> (Tr. pp. 18 and 19.)

Findings of fact will not be set aside unless clearly erroneous, and due regard shall be given to the op-

portunity of the trial court to judge of the credibility of the witnesses (new Federal Rules, Rule No. 52).

The findings of fact and the conclusions of law are amply supported by the evidence and there was no error in connection therewith.

VI.

CONCLUSION.

Appellee submits that the judgment should be affirmed.

Dated, Fresno, California,
January 24, 1949.

Respectfully submitted,
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